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Supreme Court of the United States

October Term, 1960

MELQUIADES DEJESUS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Petitioner MELQUIADES DEJESUS respectfully prays this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 13, 1961, affirming the conviction of appellant in the United States District Court for the Southern District of New York on August 11, 1960, on nine counts of violation of federal laws relating to interstate or foreign transportation of lottery tickets and conspiracy.

The opinion of the United States Court of Appeals for the Second Circuit, Magruder, Circuit Judge, October Term, 1960, #222, page 1363, has not yet been officially or unofficially reported; such opinion is appended hereto as a part of this petition. No opinion was rendered by the United States District Court for the Southern District of

New York, Murphy, District Judge, upon defendant's conviction before that Court without a jury.

JURISDICTION

The judgment sought to be reviewed is the affirmance on April 13, 1961, of the criminal conviction of appellant on August 11, 1960, of nine counts of violation of federal laws relating to interstate or foreign transportation of lottery tickets, one such count charging conspiracy under 18 U.S.C. §371, and eight such counts charging violations of 18 U.S.C. §1301. The jurisdiction of the United States District Court was based on the allegations of violations of said Federal Statutes committed within the Southern District of New York.

Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. 1245 (1), which reads in relevant part as follows (exclusive of catchline):

> "Cases in the courts of appeals may be reviewed by the Supreme Court * * *:
>
> "(1) By writ of certiorari granted upon the petition of any party to any * * * criminal case, * * * after rendition of judgment * * *",

and is invoked pursuant to Rule 19 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Does an advance expression, in answer to a request, of willingness to receive, in a wholly intrastate transaction in New York, lottery tickets or lists in fact transported by

another in violation of 18 U.S.C. §1301, and subsequent actual receipt thereof in such a wholly intrastate transaction after the interstate shipment had terminated, render the person receiving such lottery tickets and lists guilty of conspiracy so to transport such lottery tickets and lists, in violation of 18 U.S.C. §371?

2. Does an advance expression, in answer to a request, of willingness to receive, in a wholly intrastate transaction in New York, lottery tickets or lists in fact transported by another in violation of 18 U.S.C. §1301, and subsequent actual receipt thereof in such a wholly intrastate transaction after the interstate shipment had terminated, render the person receiving such lottery tickets and lists guilty of transporting such tickets and lists in interstate commerce in violation of 18 U.S.C. §1301, alone or as amplified by 18 U.S.C. §2?

3. Does the actual receipt in a wholly intrastate transaction in New York of lottery tickets or lists, after the interstate shipment had terminated, render the person receiving such lottery tickets and lists guilty of knowingly receiving the same within the meaning and in violation of 18 U.S.C. §1301, alone or as amplified by 18 U.S.C. §2?

4. Does the payment of a sum in a wholly intrastate transaction in New York using, as a medium of payment in lieu of currency, winning tickets of a lottery theretofore conducted outside the State of New York, render the payor guilty of transporting in interstate commerce a "ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance,"

within the meaning of and in violation of 18 U.S.C. 1301, alone or as amplified by 18 U.S.C. §2?

5. Is reversable error committed by the admission of the testimony of an unqualified witness as an expert witness upon lotteries, in the absence of any other evidence whatsoever on the same points; by admitting into evidence as connected with the defendant, and over objection, documents, papers and boxes found by government agents in a residence not shown to have been the place of residence of the defendant and affirmatively shown to have been occupied by another person, particularly when dates upon said documents and papers establish that the same could not have formed part of any interstate shipments alleged in the indictment; by the admission of said papers, documents and boxes for the express purpose of showing activities of defendant not charged in the indictment; or by the cumulative effect of the admission of all thereof?

6. If some or all of the foregoing evidence is inadmissible, may a conviction be based and sustained upon the uncorroborated testimony of an admitted and convicted felon, alleged to be the principal as to whom it is charged that the defendant was an accomplice and co-conspirator, in the face of contradictory evidence of a witness with no such disability as to credibility? Was not petitioner prejudiced and deprived of a fair and impartial trial thereby?

7. Does shipment between the Commonwealth of Puerto Rico and New York constitute "interstate commerce" within the meaning of 18 U.S.C. §10?

STATUTORY PROVISIONS INVOLVED

Title 18 U.S. Code:

"Section 2. (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"Section 10. Interstate commerce and foreign commerce defined

The term 'interstate commerce', as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

The term 'foreign commerce', as used in this title, includes commerce with a foreign country."

"Section 14. Applicability to Canal Zone

In addition to the sections of this title which by their terms apply to and within the Canal Zone, the following sections of this title shall likewise apply to and within the Canal Zone: 6, 8, 11, 331, 371, 472, 474, 478, 479, 480, 481, 482, 483, 485, 488, 489, 490, 499, 502, 506, 594, 595, 598, 600, 601, 604, 605, 608, 611, 612, 703, 756, 791, 792, 793, 794, 795, 796, 797, 915, 917, 951, 953, 954, 956, 957, 958, 599, 960, 961, 962, 963, 964, 965, 966, 967, 1017, 1073, 1301, 1362, 1364, 1382, 1542, 1543, 1544, 1546, 1584, 1621, 1622, 1761, 1821, 1914, 2151, 2152, 2153, 2154, 2155, 2156, 2199, 2231, 2234, 2235, 2274, 2275, 2277, 2384, 2383, 2388, 2389, 2390, 2421, 2422, 2423, 2424, 3059, 3105, 3109."

"Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"Section 1301. Importing or transporting lottery tickets

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement or list so brought, deposited, or transported, shall be fined not more than $1,000.00 or imprisoned not more than two years, or both."

Title 48 U.S. Code (Chapter 4):

"Section 731b. Organization of a government pursuant to a constitution

Fully recognizing the principle of government by consent, sections 731b-731e of this title are now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."

"Section 731c. Submission of sections 731b-731e to people of Puerto Rico for referendum; convening of constitutional convention; requisites of constitution

Sections 731b-731e of this title shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through an island-wide referendum to be held in accordance with the laws of Puerto Rico. Upon the approval of said sections, by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico. The said constitution shall provide a republican form of government and shall include a bill of rights."

"Section 731e. Sections continued in force and effect

Sections 731, 733, 733a-1, 734, 737, 741-742, 745, 747-749, 751, 794, 795, 821, 863, 864, 867, 868, 872, 874, 875, and 891-893 are continued in force and effect."

"Section 751. Interstate commerce and certain other laws inapplicable to Puerto Rico

The Interstate Commerce Act and the several amendments made or to be made thereto, the Safety

Appliance Acts and the several amendments made or to be made thereto, and section 19a of Title 49, shall not apply to Puerto Rico."

CONCISE STATEMENT OF THE CASE

The Indictment

The first count charges that the defendant conspired with others, including one Gilberto Rodriguez, to violate 18 U.S.C. §1301 by agreeing to "receive, conceal, possess, buy, sell and facilitate the transportation in interstate commerce of lottery prize lists and quantities of paper which purported to represent tickets, chances and shares dependent upon the event of a lottery" (3a),* that they "would conceal, hide and cause to be hidden, and attempt to conceal and hide the existence of the conspiracy and would take various steps designed to prevent disclosure of their activities" (4a), and alleging as overt acts in pursuance of said conspiracy that "in or about December of 1959, in the Southern District of New York, the defendant Melquiades DeJesus had a conversation with Gilberto Rodriguez" (4a), and that the defendant "paid $6,000.00 to Gilberto Rodriguez" (4a).

The second, fourth and sixth counts charge that the defendant "did cause to be carried in interstate commerce from Puerto Rico to New York City, New York," lottery tickets (counts two and four) and lists of prizes drawn and awarded by means of a lottery (count six), on dates described respectively as "the first three weeks of December,

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* The suffix "a" appended to a numeral indicates a page in "Appellant's Appendix" in the Court of Appeals, filed in this Court by petitioner.

1959" (count two), "the last two weeks of December, 1959" (count four), and "the last two weeks of December, 1959" (count six), 4a, 5a, and 6a, respectively); and count nine charges the same offense without specifying that the transportation occurred from any particular place to any other particular place, alleging the date to be on or about January 7, 1960 (7a).

Count eight charges the transportation in interstate commerce of lottery tickets in the reverse direction, from New York City to Puerto Rico, alleging the date to be on or about the third day of January, 1960 (6a-7a).

The remaining counts charge the crime of receiving knowingly. Count three charges receipt in or about the third week of December, 1959 of the lottery tickets the transportation of which is alleged in count two, knowing they had been unlawfully carried in interstate commerce (5a). Count five charges the receipt in or about the last week of December, 1959 of the lottery tickets the transportation of which is alleged in count four, knowing that they had been so transported (5a). Count seven charges the receipt of the lists of prizes alleged in count six to have been transported, knowing they had been unlawfully transported in interstate commerce (6a).

The Evidence

The case was tried before the Court without a jury, upon a waiver by the defendant. The evidence breaks down into the following logical categories or subdivisions: the testimony of Gilberto C. Rodriguez, the principal witness for the prosecution; the testimony of Ramon Figueroa for the defendant, contradicting the testimony of Rodriguez; and

the testimony of the other witnesses, the government agents. A fourth category consists not of evidence itself but of the rulings of the District Court on the admissibility of evidences and upon motions.

The Testimony of Gilberto C. Rodriguez

The testimony of Rodriguez, although incompetent, was the only so-called evidence in any way tending or purporting to connect the defendant personally with any crime charged in the indictment. The force of that statement will become apparent when the other evidence presented by the prosecution is analyzed and discussed, *infra*.

Rodriguez testified that he pleaded guilty to the crime of transporting lottery tickets in interstate commerce (55a), and had been sentenced upon that charge (56a). The witness had been arrested on the charge in New York, held for several days, released without bail, permitted to return to Puerto Rico, re-arrested in Puerto Rico, made a statement to the authorities in Puerto Rico, was sentenced in Puerto Rico and had the case against him in New York dismissed (95a-98a). A fine of $1,000.00 only was imposed, without prison term (99a).

Aside from the specific details to be discussed, *infra*, Rodriguez' testimony (55a-99a) generally described his advent into the business of transporting lottery tickets from Puerto Rico to New York as an individual entrepreneur, purchasing the tickets in Puerto Rico with his own funds, shipping them in interstate commerce to New York consigned to himself, recovering physical possession of the tickets in New York, thereafter selling those tickets in New York, accepting payment as such in cash or in winning

tickets from prior lotteries, paying his own expenses and retaining the profit entirely for himself. No one told him where or how to obtain tickets or the price to pay for them; he figured that out for himself and made his own decisions (62a-64a, 70a, 88a-89a). No one told him how to transport tickets to New York; he selected his own means (65a, 70a, 76a). No one sought him out and suggested that he import lottery tickets or requested him to do so; with the plan and program already in mind, he sought out a prospective intrastate purchaser in New York (56a-57a).

Several points in Rodriguez' testimony, including particularly the story of how he met the petitioner, were seriously contradicted by the testimony of Figueroa, discussed *infra*, whose credibility was not seriously attacked.

After some testimony as to how he allegedly met the defendant by telephone and arranged an appointment with him (56a-60a), Rodriguez testified that, in the course of such first telephone contact, "I asked him that I was from Puerto Rico, was he interested in buying any lottery tickets from Puerto Rico" (60a). The witness then described an alleged conversation in person later the same day: "Well, I told him about he was interested in buying some lottery tickets from Puerto Rico. So then he told me, 'Yes, I am interested, and who is going to bring it over, or does it arrive with you?' I said, 'No, but I can bring it to you' " (61a-62a). He further testified that, when he suggested a price of $20.00, the defendant alleged that he could obtain such tickets from others in New York for $16.00 (62a). He then detailed his individual attempts to obtain the lottery tickets to import, including his final success (63a-64a) and his shipment of the tickets to New York (65a-66a), consigned

to himself (90a-92a). The tickets were picked up by Rodriguez in New York or were delivered on his instructions to his mother's home, a location having no connection with petitioner (77a, 89a-92a).

Rodriguez specifically admitted that he never discussed with the defendant where or how he would obtain tickets in Puerto Rico (88a-89a), and that no agreement was ever even reached with respect to the number of tickets which he proposed to sell to the defendant in New York (89a, 92a-93a), and that the defendant did not advance money for expenses or any other purpose (89a, 93a).

Winning tickets were paid to Rodriguez as part of the purchase price of new lottery tickets, according to his testimony, and not given to him to be collected for petitioner (73a, and see 92a); petitioner had no interest in or connection with any such tickets during interstate shipment, nor with arranging or facilitating such shipment.

There is no testimony anywhere in the record contradicting any of these points. On one of them, the consignment of tickets from Puerto Rico to Rodriguez himself in New York, the District Judge expressly agreed, saying "There is no dispute about that." (90a).

Various dates and exhibit numbers scattered throughout the record are of great importance. The first shipment from Puerto Rico to New York testified to by Rodriguez consisted of 400 tickets for the drawing of December 27, 1959 (68a), which Rodriguez shipped to himself on December 16, 1959 (65a).

A second shipment from Puerto Rico to New York, also consisting of 400 lottery tickets, this time for the drawing

of January 3, 1960 (69a), and also including some lists of winning tickets never identified as to date of drawing, was shipped by Rodriguez to himself on December 30th or 31st, 1959 (71a).

The next transaction to which the witness testified involved his himself taking from New York to Puerto Rico on January 3, 1960, the winning tickets which had been "paid" to him in New York (73a).

The fourth and final transaction in interstate commerce to which Rodriguez testified involved the shipment from Puerto Rico to himself in New York in care of his mother, on January 7, 1960 of 600 tickets for the drawing of January 17, 1960 (76a), which he recovered into his own possession on January 8th before being arrested on that day (96a). There is no testimony that this shipment or any part of it ever reached the petitioner, interstate or intrastate. (This is the same shipment alleged by the testimony of other witnesses, *infra*, to have been intercepted in Puerto Rico, doctored by the removal of all but one of the tickets, marked for identification, and delivered under surveillance.) When shown what was alleged to be the one ticket permitted to be delivered in the package, Government's Exhibit 1, and asked to identify it as one of the tickets placed in the box, Rodriguez said (76a) "Almost the same."

Two remaining aspects of the testimony of this witness bear directly upon his credibility. The witness testified that he had "never tried to buy more than 10 or 15 pieces, you know, because I am not—I don't was a rich man to buy whole tickets, something like that" (82a). In the context, the word "pieces" apparently refers to the 60 subdivisions of a "ticket" which are sold separately, each represent-

ing an interest in the drawing—if inexpert testimony, discussed below, is to be believed.

The witness continued, in response to the next question, "I say, I wasn't a rich man to have this money to buy whole $15. That is what I am saying" (82a). Five questions later and after the lapse of probably less than 45 seconds, the witness testified that he had $9,140 in savings in his home at the same time (83a). This is self-contradiction with a vengeance.

The most basic point of dispute between witnesses occurred with respect to Ramon Figueroa, a witness for the defense whose integrity and standing were not questioned. Rodriguez testified (86a-87a) that he met Figueroa in the Plaza Bar, on Madison Avenue; met him because he was talking Spanish and that Figueroa's conversation concerned lottery tickets and their sale in New York; that he had never met Figueroa before and did not know him. He further claimed that he asked Figueroa "Do you buy the tickets?" (87a), and was told "No, I don't buy, but I know who could buy from you", and was given a telephone number to call, by use of which he initially contacted petitioner. Rodriguez also estimated that Figueroa's age was "about 40 years, something like that", and stated that he had never seen him in Puerto Rico (98a). Since Rodriguez was himself 40 years old (55a, 78a), his estimate was that Figueroa was about his own age.

The Testimony of Ramon Figueroa

The testimony of Ramon Figueroa contradicted Rodriguez on every point. He stated that he was 62 years old (116a), that he had known in Puerto Rico since childhood

while living on a specified street in a specified community one Gilberto Cajigas, and that about the time of the alleged incident in the Plaza Bar he received a phone call from this Gilberto Cajigas (116a-117a). Figueroa stated that he had not met Gilberto Cajigas in the Plaza Bar on Madison Avenue and that he had never been to any bar; Cajigas came to his home in the Bronx.

Figueroa then described the meeting of Cajigas and the defendant, the way it was arranged and its apparent purpose, as follows. Pursuant to an appointment made in advance, Rodriguez came to Figueroa's house at 7:00 o'clock, and the latter telephoned petitioner to come meet him (120a). Figueroa introduced the two, and, he testified, when Rodriguez offered to sell lottery tickets, he was told by petitioner that he, DeJesus, was not interested because he didn't have money nor desire to get mixed up in the business (120a-121a). The discussion then turned to the purchase and sale of an automobile and, in this latter connection, petitioner gave Rodriguez a piece of paper with something written on it, relating to a meeting the following day—presumably the telephone number to which Rodriguez allegedly placed calls (121a).

Contrary to Rodriguez' testimony, Figueroa also testified that Rodriguez called him on two occasions after the above meeting (123a).

That Cajigas and Rodriguez are one and the same is established not merely by the fact that Rodriguez specifically referred to Figueroa as the source of his contact with petitioner, but also by the name of the woman, Rodriguez' mother (91a), upon whose "invitation" Government agents entered the apartment to which they had followed the de-

livery of the shipment of 600 lottery tickets which Rodriguez had consigned to himself (50a, 76a, 77a, 90a).

The Testimony of Government Agents

Five Government agents testified for the prosecution. None of them was properly qualified as an expert on lotteries in general or this Puerto Rican lottery in particular. The Government attempted to qualify only one and, it is obvious, failed completely. F.B.I. Agent O'Brien had never attended a lottery drawing (19a), or any police or other schools dealing with lotteries (19a); his experience in purchasing lottery tickets had been limited to the purchase once of a single section (20a); he never saw the preparation of winning lists (20a), nor the printing of lottery tickets (24a); he was not sure of the number of tickets printed (21a) nor did he know where they were printed (33a) or stored after printing (33a); he did not know the price paid to the Puerto Rican Government by the authorized selling agents (31a) nor had he ever seen the sale of tickets by the Puerto Rican Government to these authorized agents (33a) and he did not know the method of sale to such authorized agents (34a); he was totally unfamiliar with the financial records of the lottery operation (34a), didn't know how many winning prize lists were prepared (35a) or whether lottery tickets were sold to persons other than authorized sales agents (35a); he did not even testify to the manner of drawing winning tickets. As a Government agent, all this information was available to him and he admittedly had the opportunity to witness all these events. With this lack of qualification, there is no competent evidence in this record even to show that the Puerto Rican Government operates a lottery at all! Incidentally, his

testimony indicated that it would be impossible for Rodriguez to have purchased from one seller the quantities he claimed.

The earliest date mentioned by any of the Government agents for any purpose was January 7, 1960, the events described having taken place in Puerto Rico and being totally unconnected with the petitioner (25a, 46a). Thus there is no mention in their collective testimony, even if it be deemed admissible, of any tickets or winning lists which Rodriguez even claimed ever found their way into the possession of petitioner. Hence their testimony does not support any part of the testimony of Rodriguez which is in any way related to petitioner—or to any of the first eight counts of the indictment.

Customs Agent Gonzalez testified, generally, to intercepting at the airport in Puerto Rico a shipment of 600 lottery tickets (no winning lists) which Rodriguez testified that he shipped from Puerto Rico to himself in New York. These agents removed all but one ticket, initialed and dated that one, filled the boxes with paper, let the shipment go on and the matter was then taken over by agents in New York, presumably alerted to watch for the shipment. Their testimony related solely to January 7th and in no way related to the petitioner.

F.B.I. Agent Donnelley covered the arrival of that shipment in New York on January 8th, observed the address on the package, followed the delivery truck to that address, entered the apartment upon the "invitation" of Mrs. Cajigas, as mentioned above (50a), who Rodriguez identified as his mother (91a). He seized the cartons, scrap paper and one ticket, and turned them over to F.B.I. Agent Lewis.

As in the case of agents O'Brien and Gonzalez, his testimony does not so much as mention the name of the petitioner, set forth any facts connecting in any way to the petitioner or support any of the testimony of Rodriguez which purports to involve the petitioner.

F.B.I. Agent Durkin conducted a search on January 30, 1960, in company with Agent Lewis and others, of a single family residence which he and trial counsel for the Government sought to imply was the place of residence of petitioner. There is no testimony to that effect in the record, however. Agent Durkin testified that he was admitted to the premises by a woman he made no attempt to identify, who "said that she was the mother of Charlie" a name by which the petitioner was alleged to have been known, "and that Charlie would probably be over there shortly" (100a). Whether "Charlie" would be there for a visit or as a return to "his home" was not so much as hinted at, nor, when the petitioner arrived, was there any indication that he was that "Charlie", so far as the testimony discloses.

A search of the premises disclosed five lists of winning tickets for the drawing of January 17th (101a, 109a), as to the interstate shipment of which lists there is no evidence whatsoever—not even by Rodriguez; also found were some complete lottery tickets (101a), apparently for the drawing of January 24th, although there was no actual testimony as to such date, and there is no evidence of any kind in the record as to the interstate shipment of any such tickets; finally, the search revealed some sections of lottery tickets described as bearing various dates (104a, 109a), none of which were identified in any way as to date. None of this evidence bears in any way on any shipment alleged

in the indictment, or on any transaction as to which anyone—even Rodriguez—testified to a connection with the petitioner.

Careful scrutiny of the record discloses no indication whatsoever that any of these items were found in the possession of petitioner. First, as has already been mentioned, there is no indication in the record that this was petitioner's home at the time, nor is that the fact. Secondly, all but the few "sections" of tickets (found in a bedroom of an unidentified occupant) were located in various places in the kitchen of the premises, places used by whoever did the cooking, such as the rotobroiler and the bread drawer (101a). With two women present in the premises (100a), this would hardly seem to create an inference of possession by the petitioner, even were it established that he resided in that house.

The alleged words of confession of possession of winning lists and tickets and of selling tickets (104a) are coupled with a denial of importation or transportation interstate and are unconnected with any count of the indictment whatsoever.

The testimony of FBI Agent Lewis as to the alleged confession (107a) does not even mention any admission of sale—merely possession. In all other respects, the testimony of this witness had no bearing on the case. He identified various exhibits as having been turned over to him by other agents, but could not fill the gaps which made the identification by those other agents inadequate.

A few other points relating to the evidence are worthy of mention. It was stipulated that an employee of the New

York Telephone Company would have testified that telephone number WY 1-1974 is an unlisted number for the telephone at the premises where the petitioner "came over" and was arrested on January 20th. The stipulation does not indicate the identity of the subscriber to that telephone nor in any way connect it with the petitioner (101a).

A reading of the evidence discloses a sloppy confusion, intolerable in a criminal prosecution. The attitude of the prosecution is illustrated by the reasons given (109a) for seeking the admission into evidence of certain exhibits, totally unconnected with the transactions charged in the indictment, namely, to show "that the defendant's activities have not been isolated to the transactions that he has had with Rodriguez". The evidence sought to be admitted at that point consisted of lists and tickets bearing dates different from and subsequent to the dates of the transactions alleged in the indictment. It seems that the prosecution thought it sufficient to show that there may have been some connection between the petitioner and some lottery transactions, not necessarily those mentioned in the nine counts, and involving mere possession of lottery tickets rather than anything relating in any way to interstate commerce.

In any event, the Court accepted evidence from unqualified "expert" witnesses, evidence not connected with the crimes charged in the indictment and evidence not connected with the petitioner. In order to have "a government of laws and not of men" under these circumstances, it would have to be assumed that the District Judge was something other than a human being, with self control and mental discipline far beyond any known on this earth.

A weak case of possession of lottery tickets in violation of the Penal Law of the State of New York may, possibly,

have been made out by the evidence presented; no proof of any violation of the laws of the United States was established and no count in the indictment was proven; the counts of receiving knowingly are insufficient on these facts as a matter of law, as will be established, *infra*, while no other count was sufficiently established as a matter of fact even to require a discussion of law.

POINT I

The evidence of conspiracy was insufficient, as a matter of law, to sustain the verdict of guilty on Count One.

Assuming *arguendo* that petitioner purchased lottery tickets from Rodriguez in New York, it is a far cry from that assumption to the establishment of a conspiracy. Otherwise, every act of "knowingly receiving" in violation of 18 U.S.C. §1301 would constitute a conspiracy.

Recognizing this rule of law, the Court of Appeals, in the one sentence it devoted to the conspiracy charge, said: "An agreement which entailed a prohibited interstate shipment was made and the necessary overt acts were carried out" (Appendix A, *infra*). There is no evidence of any such agreement, however, as already pointed out, even if the testimony of Rodriguez is to be fully credited and deemed of sufficient weight.

Rodriguez testified that he attempted to find someone who would buy lottery tickets from him in New York, that he sought out the petitioner for this purpose and offered to sell him lottery tickets in New York. At worst, and without reference to the evidence discrediting Rodriguez'

testimony, petitioner may have indicated in a general way that he would purchase lottery tickets if they were available for sale to him in New York. Clearly, this is insufficient to constitute a conspiracy to transport the tickets in interstate commerce. The government attempts to equate knowledge that something may or will be done with conspiracy to do that thing. Were that so, every purchaser of an illegal item, be it lottery tickets, narcotics or anything else, would on the occasion of his *second* purchase be a conspirator to the unlawful importation of the item, since it might be inferred reasonably that he knew, from the time of his first purchase, that the actual "importer" was bringing the item into the jurisdiction in violation of the law. That is not the law, nor is a conversation whereby the petitioner allegedly became a prospective intrastate purchaser an overt act in furtherance of such a conspiracy, even if the testimony be true.

Similarly, the payment as alleged for the intrastate purchase of lottery tickets is not an overt act in furtherance of a conspiracy to import them. The act of payment is more reasonably susceptible of other obvious purposes, and it does not support a conspiracy charge merely because the government so alleges. Acts in furtherance of a conspiracy must be shown to be acts committed for the purposes of the alleged conspiracy and not for other, more reasonable and more probable purposes.

The government's position really boils down to the claim that the knowing purchaser is a co-conspirator. The position is not sound. It has been held that the purchaser of narcotics is neither an accomplice nor a co-conspirator of the seller's, *Wallace* v. *U. S.*, 243 Fed. 300 (7 Cir. 1917).

cert. den. 245 U. S. 630, 38 Sup. Ct. 11, despite the fact that such purchaser is a drug addict, buying on a regular basis and with full knowledge of the illegality.

Similarly, the purchaser of intoxicating liquor while the Volstead Act was in force under National Prohibition, was not an accomplice or co-conspirator. *Singer* v. *U. S.*, 278 Fed. 415 (3rd Cir. 1922), cert. den. 258 U. S. 620, 42 Sup. Ct. 272. The point is highlighted there since the purchase was not a crime and the purchaser had committed no offense and was entitled to an acquittal on all counts in the absence of conspiracy or complicity. To the same effect, see *DeLong* v. *U. S.*, 4 F. 2d 244 (8th Cir. 1925), where the defendant sought unsuccessfully to buttress an entrapment argument by alleging that the prohibition officers who purchased the liquor were thereby rendered accomplices or co-conspirators, weakening their testimony.

It has equally been held that the woman transported in interstate commerce in violation of the White Slave Act is not an accomplice or co-conspirator. *Hays* v. *U. S.*, 231 Fed. 106, aff'd. 242 U. S. 470, 37 Sup. Ct. 192.

Had the petitioner advanced money for expenses, provided information as to how the tickets might be obtained, participated in arranging for their transportation or agreed to accept delivery before they left interstate commerce, and done an overt act along any of those lines, the government's position might have some substance; on the record there is no scintilla of evidence of conspiracy.

POINT II

The evidence of complicity in the unlawful transportation of lottery tickets and prize lists from Puerto Rico to New York was insufficient, as a matter of law, to sustain the verdict of guilty on Counts Two, Four, Six and Nine, or any of them.

What has been said with respect to the charge of conspiracy in violation of 18 U.S.C. §371 in Point I, *supra* applies *a fortiori* to the four charges that petitioner caused illegal transportation in violation of 18 U.S.C. §1301. There is not even a suggestion in the record that petitioner carried any prohibited items interstate, shipped them, deposited them with a carrier, arranged for their transportation, paid for their transportation, received them from the interstate carrier, directed the interstate carrier or its agents where to deliver them, or had any other connection whatsoever with such interstate shipment. The indictment carefully and specifically sets forth in each of the above mentioned counts that the petitioner "did cause to be carried in interstate commerce" the prohibited items. In terms of the evidence in this case, already discussed in detail, only two conceivable questions can be raised, the same two already considered.

If the mere purchase of lottery tickets in New York rendered the petitioner guilty of importation, not only would an extraordinarily strained construction of the first clause of §1301 be involved, distorting the meaning of the words "brings", "deposits", or "carries", but the second clause of the section which makes him a violator who "knowingly takes or receives" would be rendered surplusage. The ordi-

nary rules of judicial construction forbid such a result, even before considering that this is a penal statute, to be strictly construed. *France* v *United States*, 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595 (1897). Mere purchase of the fruits of illegal importation, even assuming that to have been proven, does not constitute importation itself.

Secondly, however, the government again relies on the preliminary conversation as establishing that petitioner "did cause" the prohibited acts. Here again, there must be some limit to how far the prosecution may distort the ordinary meaning of words in a criminal case. If petitioner had sought out Rodriguez and, by conversation or otherwise, "caused" him to import tickets, the government might have an argument—albeit a weak one which appears incorrect from a simple reading of the statute. Such are not the facts of this case. Rodriguez allegedly sought out petitioner, told him he was going to bring tickets into New York and asked whether petitioner would buy them in New York. Neither the "yes" answer to which Rodriguez testified nor the "no" answer to which Figueroa testified can convert such a conversation into conduct violative of §1301.

In an attempt to circumvent these problems, the government seeks to invoke 18 U.S.C. §2, defining when an accomplice shall be punishable as a principal. Subsection (b) thereof uses the word "causes", which appears in the indictment, and, in this respect, merely invokes the argument which has just been answered. Neither the purchase of the fruits of illegal importation nor a conversation such as that just described can be said to cause the importation. Subsection (a) is equally inapplicable; clearly it is not alleged that petitioner "aids, abets, counsels, commands,"

nor, in this context, can the phrase "induces or procures" have any meaning other than "causes". Thus, while cases can easily be imagined where the language of §2 encompasses conduct not included in the substantive offense itself —the mastermind who does not participate in the acts, the banker who advances money, the "fingerman", and many others—on the allegations and evidence in this case §2 adds nothing relevant to what is proscribed by §1301.

To avoid undue repetition, it is respectfully pointed out that the cases cited under Point I are equally applicable here, as are the cases cited, *infra*, under Point IV.

Section 2 is really a broad definition of an accomplice. It is clear that, viewed as a whole and in all their possible applications, the words "accomplice" and "co-conspirator" have different meanings, despite a possible area of overlap. On the facts of this case, however, the two terms are used to mean the same thing. The same conduct is alleged to constitute, on the one hand, a conspiracy and overt acts in pursuance thereof and, on the other hand, causing the substantive offenses. If either set is struck down, the other set must fall also.

It seems clear that the government has sought to turn the offenses admittedly committed by Rodriguez into criminal conduct on the part of petitioner. It is respectfully submitted that there is no basis for conviction on any of these counts.

POINT III

The evidence of interstate transportation in the reverse direction from New York to Puerto Rico, was insufficient, as a matter of law, to sustain the verdict of guilty on Count Eight.

Continuing the assumption that the evidence of Rodriguez is of sufficient weight and that the transactions he described may be deemed actually to have occurred, the only evidence in the record in any way connected with Count Eight is the testimony, outlined *supra*, to the effect that petitioner paid Rodriguez for the purchase of lottery tickets in New York, using as a medium of exchange in lieu of money some winning tickets on a prior lottery. On that assumption, which is still for purposes of argument only and without admitting such acts to have occurred, it is uncontroverted in the record that petitioner received "value" simultaneously with such payment, and had no more interest in the "winning tickets" one second thereafter than he had in the specific dollar bills paid over for the same purpose at the same time.

There is no hint in the testimony that petitioner gave winning tickets to Rodriguez to collect for petitioner or for the joint benefit of Rodriguez and petitioner. There is no suggestion in the record that it made any more difference to petitioner whether Rodriguez cashed in those winning tickets or threw them away than it did whether Rodriguez pocketed the United States currency also paid him or tore it up. Thus the admitted facts make it abundantly clear that no violation of 18 U.S.C. §1301 was committed even if

"winning tickets" be deemed within the proscription of that section.

A second separate and distinct difficulty with Count Eight, however, lies in the answer to the question, is a "winning ticket" a document "dependent upon the event of a lottery" as alleged in the indictment and as set forth in §1301. Clearly, the indictment, like the penal law, must be strictly and narrowly construed, although admittedly not so much as to deprive the words used of their natural meaning.

It is respectfully submitted that a "winning ticket" is in no sense dependent upon the event of a lottery, the lottery already having occurred and there being no remaining element of chance dependent upon any event whatsoever; a winning ticket is a fixed claim upon a portion of a specified fund of money set aside for a specific purpose, with no gamble whatsoever remaining involved.

Thus Count Eight cannot stand and the conviction thereunder must be reversed for two separate reasons, even if the prosecution's testimony be accepted, namely, that the evidence establishes clearly that petitioner had no connection with the interstate transportation of any winning tickets and, further, that such winning tickets are not within the ban of §1301.

POINT IV

The evidence of receiving lottery tickets and lists of prizes was insufficient, as a matter of law, to sustain the verdict of guilty on Counts Three, Five, and Seven, or any of them.

The only tolerably reasonable arguments in support of any conviction in this case are those, pursuant to these three counts, alleging that petitioner "did receive" lottery tickets and prize lists "knowing that they had been unlawfully carried in interstate commerce.", allegedly in violation of 18 U.S.C. §1301, second clause, and, in one of the three cases (count five,) as amplified by 18 U.S.C. §2. Although the conviction on these counts cannot be sustained, careful analysis of the law is justified not merely by the reality of conviction but by the actual question presented on these facts.

As outlined in great detail, *infra*, the admitted violator, Rodriguez, shipped these items in interstate commerce consigned to himself in New York, physically recovered possession from the carrier and, only thereafter, allegedly contacted and sold them to the petitioner. It follows as a factual matter that the interstate shipment and the interstate character of the transaction had terminated prior to the first connection with petitioner. In other words, the testimony, even if believed and of sufficient weight, does not indicate that petitioner received the prohibited goods in or directly from interstate commerce, but only that he received goods which had theretofore been illegally transported in interstate commerce. These necessary conclusions of fact provide the basis for discussion of the law.

It has been suggested, on the one hand, that Congress has no power under the Interstate Commerce Clause of the Constitution, to proscribe, as criminal, conduct taking place only after interstate shipment has ended, and, on the other hand, that, even if Congress has such power, it has not indicated any intent to do so. It appears that these questions have never been settled by this Court and that the lower courts, in disposing of them in the manner about to be urged, have not distinguished between congressional intent and constitutional limitations upon the legislative power.

On whichever basis, it has been well established in the lower federal courts that the possibility of violating §1301 of Title 18 ends when the interstate shipment terminates. The two leading cases on the subject appear never to have been questioned in the almost thirty years since their opinions were promulgated.

First in point of time was *United States* v *Wade*, 59 F. 2d 831 (D.C., S.D. Texas 1932). Wade, who pleaded guilty and was sentenced, arranged the interstate shipment of lottery tickets to himself and actually received them. "Such tickets, etc., came to a 'state of rest' in Wade's hands. Sonneborn Bros. v. Cureton, 262 U. S. 507, 43 S. Ct. 643, 67 L. Ed. 1097." The other two defendants, who pleaded not guilty, were accused of the offense here relevant. The court stated their participation and acts as follows: "Wade opened the packages and delivered some of the lottery tickets to Wolf and Dean. They, knowing the manner in which Wade had obtained them," sold them. Wolf and Dean were found not guilty. The reasoning of the court was set forth succinctly in its one page opinion:

> "This statute is highly penal, and must be strictly construed. France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595. When the history of this statute is looked to, it is clear that it was the intention of Congress to prohibit the transportation of matter concerning a lottery in interstate commerce, and not to prohibit the character of intrastate transactions to which Wolf and Dean were parties. Such transactions are adequately dealt with by state law."

The *Wade* case would seem to be directly in point.

Equally instructive is a decision from the very Court of Appeals to which petitioner seeks certiorari, *United States v. McGuire*, 64 F. 2d 485 (2d Cir. 1933). There the wording of the first count of the indictment more clearly raised what is, nevertheless, precisely the same question here presented, by referring to the receipt of instruments "which had theretofore been transported" in interstate commerce (64 F. 2d at 489). Judge Chase, speaking for a court consisting also of Judge A. N. Hand and Judge Manton, which was unanimous on this point (Judge Manton dissenting with respect to another count), said:

> "If the words of the indictment are given their usual meaning, the interstate carriage of the tickets had ended before the defendants caused Finn to receive them, and it might have ended an indefinite time before. This statute must be strictly construed. France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595. It is the authority of Congress to regulate interstate commerce which makes such a statute valid. Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492. After the tickets, though they had been sent from Pennsylvania to New York, were received from the interstate carriage in New York, they were no longer in interstate commerce.

> Sonneborn Bros. v. Cureton, 262 U. S. 507, 43 S. Ct. 643, 67 L. Ed. 1095. * * * An essential fact, viz. that the defendants caused Finn to receive in interstate commerce, was lacking" (64 F. 2d at 491).

(It may be noted in passing, with reference to Point I, *supra*, that a count charging conspiracy to ship in interstate commerce was upheld by a split court, Judge Manton dissenting. The facts as stated by that court contrast drastically with the facts alleged in support of the first count of the indictment in this case. The court said: "All three put their money and credit behind the plan, and, when the program had been carried out in the way the jury was justified in finding from the evidence these respondents had agreed it would be, they divided the profits among themselves" 64 F. 2d at 492.)

The *McGuire* case, like the *Wade* case, may be simply stated as holding that, within the constitutional power confided to Congress, Congress has proscribed the receipt of lottery tickets *in or directly from* interstate commerce; but not merely *after* such shipment. Where *Wade* speaks solely in terms of congressional intent, *McGuire*, by the citation of the *Champion* case and the sentence of the opinion immediately preceding such citation, speaks alternatively of the limits upon the authority of Congress.

The *Champion* case, cited in the quotation from *McGuire*, *supra*, was argued three times over a period of two years and finally decided in 1903, under a predecessor statute prohibiting the interstate shipment of lottery tickets. The case arose as habeas corpus to inquire into detention (before trial) by a United States marshall under a warrant charging violation of that act and conspiracy to violate it.

The basis of the proceedin[illegible] was the contention of the appellan[illegible] that Congress had no power to prohibit the interstate transportation of lottery tickets. In what became so famous a precedent that the dissent was all but forgotten, Mr. Justice Harlan reviewed all the authorities on the commerce clause. Holding that Congress had the power to prohibit the interstate shipment of lottery tickets, the court said:

> "Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'wide spread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits" (188 U. S. 357, 47 L. ed. 503-504).

The court also declared that "the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such

limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument" (188 U. S. 362-3, 47 L. ed. 504).

These quotations should suffice to illustrate the obvious conclusion that it is only interstate commerce which Congress has a right to regulate and that the regulation of intrastate commerce, even in lottery tickets, is reserved to the states. It is axiomatic, and indeed referred to in the *Champion* opinion, that Congress occupies the entire field with respect to foreign and interstate commerce, so that no state law can operate therein (except pursuant to enabling legislation). If the intrastate sale alleged to have been made by Rodriguez to petitioner is a transaction in interstate commerce, it is impliedly beyond the power of the State of New York to reach and punish. Such a result is unthinkable.

In the light of these considerations, it becomes more understandable that the Second Circuit, in *McGuire, supra*, without referring to them as alternatives, set forth the two conclusions that Congress did not intend to reach such a transaction and, perhaps, that Congress had no power to reach such a transaction. The result is the same in either event, since it is axiomatic that a statute will not be so construed as to render a portion thereof unconstitutional if an equally reasonable construction will avoid that undesirable effect.

For all of these reasons, it is respectfully submitted that the alleged receipt of prohibited articles by petitioner from Rodriguez cannot constitute a violation of the second clause of 18 U.S.C. §1301 on the basis either of the intent of Con-

gress in enacting that section or the power to Congress so to do.

POINT V

The evidence on all Counts was incompetent, as a matter of law, to establish guilt on any of them.

It is recognized that this Court will not normally consider questions as to the weight of evidence, nor is it proposed that it do so in this case. The competence of evidence is another matter, however. Unfortunately, weight sometimes shades imperceptibly into competence.

As has been pointed out, *infra*, the government introduced only one witness which it sought to qualify as an expert. The need for expert testimony in connection with a conviction of this sort requires no citation. The complete lack of qualification of the government's only alleged expert has already been set forth in detail, which need not be repeated here. Having failed to qualify such an expert, there is no competent—indeed no admissible—evidence in the record that the articles blithely referred to as lottery tickets and lists of prize-winning tickets were in fact connected in any way with any lottery. There was no competent or admissible evidence presented that the Puerto Rican government in fact conducted any lottery at all. These are essential elements of the government's case, without which conviction on each and every count must be reversed.

Turning to another phase of the evidence presented and invoking the power of this Court to supervise the lower federal judiciary, and for the purpose of insuring a defendant a fair and impartial trial, the admissibility and com-

petence of other evidence must now be called into question. The importance of these questions is further emphasized by the well known rule that the testimony of an accomplice requires the most careful scrutiny and the exercise of the greatest caution. *E.g., United States v. Tarricone*, 242 F. 2d 555. Rodriguez, if his testimony is to be credited at all, was at very least an accomplice, and the acceptance of his testimony was clearly within that rule. The need for scrutiny and caution is all the greater since the story he told was expressly contradicted on every point of joint contact by the defense witness, Figueroa. No doubt it was for this reason that the Court of Appeals found it necessary to justify its affirmance with the claim that the testimony of Rodriguez "was amply supported by that of the government agents and by the introduction of the bills of lading for the three shipments, as well as the various lottery tickets and lists found in the defendant's apartment" (Exhibit A, page 1367-8). What was this ample support?

The first batch of government agents testified with respect to the Puerto Rican end of a single, 600-ticket shipment, of which one ticket was permitted to continue. Other agents testified to surveilance of the arrival of that shipment in New York and its delivery to Rodriguez or his mother's home. While, undoubtedly, this is the shipment referred to in Count Nine of the indictment, there was absolutely nothing in the testimony of any of these agents which in any way connected that shipment with the petitioner, nor was anything found in the premises erroneously referred to as his home which was connected with such shipment. These agents had nothing further to offer. It may be a close question whether their testimony was admissible at all, as tending to confirm certain statements in the testimony of

Rodriguez—statements not connected with petitioner—but clearly their testimony had no competence whatsoever insofar as petitioner's guilt or innocence was concerned.

The agents who arrested petitioner and searched the premises where they awaited him, made no attempt to establish that petitioner resided at that location, nor did any other government evidence of any kind bear on this question. In the absence of such a connection, nothing they found in the premises was in any way connected with petitioner, and it should have been excluded. Those exhibits were also inadmissible for the further reason that none of them related to any of the transactions alleged in the indictment, as clearly established by the dates set forth, *supra*. The testimony of the government agents went no further than to introduce such exhibits, except for quoting alleged words of confession which, in no event, can be deemed to involve confession of any federally cognizable offense.

The bills of lading? The testimony is clear that they were for shipments from Rodriguez to Rodriguez, and in no way connected with this petitioner.

Upon such careful scrutiny, no one of the items or categories of evidence which the Court of Appeals thought "amply supported" the testimony of Rodriquez was competent evidence at all. Once that is realized, the aspect of this case becomes simple to state. Rodriguez has confessed to certain offenses. He is a convicted felon. Upon the witness stand, he told a story which, in all its essentials, related to activities conducted solely by himself, but he sought to connect petitioner with that story at several points. Without reference to any of the legal questions raised in the preceding Points of this petition, whatever

of his story could be corroborated was so corroborated solely by evidence equally susceptible of sustaining the conclusion that petitioner had no connection whatsoever with any of these matters.

When to this is added the contradictory testimony of Figueroa on every point of overlap, at least one of which, the original alleged meeting with petitioner, was crucial to the coherence of Rodriguez' story, together with the erroneous rulings upon the admissibility of evidence already mentioned, how shall the rule be applied which requires that the testimony of an accomplice must be carefully scrutinized and cautiously admitted? It is respectfully submitted that this situation is far past the point where it may disposed of by saying that the relative credibility of witnesses is for the trier of facts! The petitioner has been deprived of the fair and impartial trial to which he is entitled. As a matter of law, this cannot be evidence of guilt beyond a reasonable doubt.

POINT VI

Shipment between Puerto Rico and New York is not "interstate", and all Nine Points of the indictment must be dismissed and convictions thereunder reversed, as a matter of law.

There is a further matter of law affecting equally, as with the immediately preceding point of this petition, all the counts of the indictment, which requires a reversal of the conviction. It is respectfully submitted that, since July 25, 1952, the effective date of the new status of Puerto Rico, commerce between that commonwealth and New York has

not constituted and does not constitute interstate commerce within the meaning of 18 U.S.C. §10. This somewhat startling conclusion is only reluctantly reached.

Since the new status of Puerto Rico was arrived at by a procedure "in the nature of a compact" (48 U.S.C. §731b), it is doubtless true that Congress had, at that time, the power to provide that these sections, relating to interstate transportation of lottery tickets and to conspiracy, should continue to apply as fully as theretofore. Indeed Congress did specify which sections of Title 48 should continue to apply, 48 U.S.C. 731e. That it is necessary to specify sections of Title 18 which are to apply in unusual circumstances is not unknown to Congress, as evidenced by 18 U.S.C. §14, in the case of the Canal Zone, continuing the applicability of 18 U.S.C. §371 and §1301, but not of §2.

If Congress had the power at the time of the compact, it is equally clear that Congress no longer has any such unilateral power without the consent of the Puerto Rican Government, from the very meaning of the word "compact". *Virginia* v. *Tennessee*, 148 U.S. 503, 13 Sup. Ct. 728, 37 L. ed. 537 (1893); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 71 Sup. Ct. 557, 95 L. ed. 713 (1951); *Mora* v. *Torres*, 113 F. Supp. 309, 315 (D.C., Puerto Rico 1953), aff'd 206 F. 2d 377 (1st Cir. 1953), Magruder, C.J.

The *Mora* decision sets forth at length a well reasoned explanation of the new and independent status of Puerto Rico. Coming so soon after "independence", it can only be regarded as a judicial declaration thereof or bill of rights. Correspondingly, while a Court of Appeals affirmance of a District Court decision does not necessarily constitute approval of each and every comment contained in

that decision, the length, logic and importance of the lower court's conclusions in *Mora* would have called for prompt correction had the First Circuit disagreed.

Mora was an action for an injunction against a Puerto Rican official who had issued a maximum price order. The injunction was denied after a discussion of various alternative sources of the power to issue such an order, and various constitutional rights of the plaintiffs.

One of the conclusions of law set forth by the district court was: "(4) The 14th Amendment and the Interstate Commerce Clause of the Constitution of the United States are not applicable to this case" (113 F. Supp. at 312). Another was that the Fifth Amendment, restraining the United States and its agencies and formerly applicable to Puerto Rico, no longer applies as such, the court saying "it (Puerto Rico) is not now a dependency, possession nor territory of the United States" (113 F. Supp. at 313).

What, then, is Puerto Rico, and what is its relationship with the United States? The district court said that "A new type of relationship has been created. Cf. Senator Lehman's statements in the Senate, Congressional Record, Vol. 98, No. 110, June 23, 1952, P. 7973, Vol. 98, No. 117, July 1, 1952, P. 8906" (113 F. Supp. at 313).

"Under the new relationship now existing, Puerto Rico enjoys the total substance of self-government and there is a plenitude of government by consent, which realities are incompatible with the previous status of Puerto Rico as a possession, dependency or territory" (113 F. Supp. at 313-4).

Congressman Aspinall stated, P. 6204, 98 Cong. Rec., No. 92, May 28, 1952, according to the district court, "This procedure is something entirely new in the history of the Government of the United States. We are not treating Puerto Rico as a state and we are not treating Puerto Rico as a possession" (113 F. Supp. at 314).

"The new relationship between the Commonwealth of Puerto Rico and the United States cannot be precisely catalogued. It is not subject to any specific labels or categories, for it constitutes an innovation in the history of communities which were previously considered to be territories. A new pattern of government has been created. As cited by Chief Justice Snyder, of the Supreme Court of Puerto Rico (hearings before the Committee of Public Lands of the House of Representatives, on March 16, 1950), Justice Frankfurter said in 1914, when he was serving in the Department of War in connection with Territorial Affairs, as follows:

> "* * * One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open' " (113 F. Supp. at 319).

Reverting to the conclusions reached, the court said that the 14th Amendment "is not applicable to Puerto Rico, for Puerto Rico is not a federated State" and was not one previously (113 F. Supp. at 319). More to the point, the court concluded:

> "The Interstate Commerce Clause is not applicable to Puerto Rico, Sancho v. Bacardi Corp. of

America, 1 Cir., 109 F. 2d 57 (reversed on other grounds in Bacardi Corp. of America v. Domenech, 311 U. S. 150, 61 S. Ct. 219, 85 L. Ed. 98), Buscaglia v. Ballester, supra* (*1 Cir., 162 F. 2d 805); Cases v. United States, supra* (* 1 Cir., 131 F. 2d 916), and it has not been made a part of the compact with Puerto Rico" (113 F. Supp. at 319).

In affirming the *Mora* decision, Judge Magruder, writing for a unanimous First Circuit, agreed that Puerto Rico had not become a state like the other forty-eight, although, he commented, that it may have become one within some other common meaning or usage (206 F. 2d 377, 387). No disapproval of any part of the opinion below was expressed.

What is the result? There is always a problem when the court is faced with the decision whether to fill a gap left by Congress, perhaps intentionally and perhaps inadvertently, or to leave that task to Congress itself. Undoubtedly the problem is made the more difficult by the overwhelming probability that Congress no longer has the power to remedy the situation and fill the gap. The intent of Congress is, however, rather clear, particularly in view of its rejection of proposed amendments to the compact in 1952 which, it expressly felt, would have detracted from the independence of the new status of Puerto Rico then about to be created, all as described in the *Mora* opinion. How can we say today that, in granting Puerto Rico "independence", Congress did not feel that the inapplicability of the Commerce Clause was a small price to pay for the new relationship which did not make Puerto Rico a "foreign country"? This argument is buttressed by the express provisions of 48 U.S.C. 751, which expressly made inapplicable to Puerto Rico the Interstate Commerce Act

and certain other acts relating to interstate commerce, although this section was adopted prior to the attainment of commonwealth status.

Finally, for purposes of the case at bar, petitioner may be permitted to paraphrase the most famous reference of all time to the United States Constitution and say that we must never forget that it is a penal statute we are construing.

It is respectfully submitted that, in 1952, Congress and Puerto Rico (pursuant to 48 U.S.C. §731c), created a relationship between Puerto Rico and the United States which is not comprehended within the scope of 18 U.S.C. §10, and that, as a result, none of the sections of Title 18 pursuant to which the indictment was drawn apply to any of the transactions alleged in this case.

CONCLUSION

The courts below have decided important questions of federal law which have not been, but should be, settled by this Court, in the opinion of the undersigned; have decided federal questions in a way believed to conflict with applicable decisions of this Court, and are believed in other respects to have so conducted and disposed of this case below as to call for an exercise of the power of supervision vested in the Supreme Court of the United States.

Petitioner stands accused and convicted of each of nine specific charges—not of having an unsavory reputation or a criminal record and not of being a character who, for some vague reason, ought to be convicted of something—and not of violation of the laws of the State of New York.

Those nine specific counts and the convictions thereupon cannot stand.

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order the judgment of conviction herein reversed upon all nine counts.

Respectfully submitted,

BARRY GOLOMB,
Member of the Bar of the Supreme Court of the United States,
Member of the Law Firm of
Wasserman & Shagan,
Attorneys for Petitioner,
41 East 42nd Street,
New York 17, N. Y.

Of Counsel:

MAURICE W. BERNSTEIN
11 Park Place
New York 7, N. Y.

CHARLES BRICKER
320 Broadway
New York 7, N. Y.

EXHIBIT A

FOR THE SECOND CIRCUIT

No. 222—October Term, 1960.

(Argued January 6, 1961 Decided April 13, 1961.)

Docket No. 26590

UNITED STATES OF AMERICA,

Appellee,

—v.—

MELQUIADES, DE JESUS

Appellant.

Before:

MAGRUDER, WATERMAN and FRIENDLY,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Defendant appeals from a judgment of conviction in an indictment charging a conspiracy under 18 U. S. C. §371 and various substantive offenses in violation of 18 U. S. C. §1301. Defendant urges the insufficiency of the evidence to sustain a conviction and also that transportation from Puerto Rico to New York City is not interstate commerce within the definition of 48 U. S. C. §10. Conviction affirmed.

Exhibit A

ARTHUR I. ROSETT, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, and Herbert B. Greene and Gideon Cashman, Assistant United States Attorneys, on the brief), *for appellee.*

CHARLES BRICKER, New York, N. Y., *for appellant.*

MAGRUDER, *Circuit Judge*:

Appellant De Jesus was indicted in a nine-count indictment framed under 18 U. S. C. §1301, which reads as follows:

> "Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

Exhibit A

Count 1 charged the defendant with having entered a conspiracy to commit an offense against the United States under 18 U. S. C. §1301. Count 2 charged that the defendant in or about the first three weeks of December, 1959, did knowingly and willfully cause to be carried in interstate commerce from Puerto Rico to New York City, New York, certain lottery tickets. Count 3 charged that the defendant in or about the third week of December, 1959, did knowingly and willfully receive said lottery tickets knowing that they had been unlawfully carried in interstate commerce. Count 4 charged that the defendant in or about the last two weeks of December, 1959, knowingly and willfully did cause to be carried in interstate commerce from Puerto Rico to New York City certain lottery tickets. Count 5 charged that the defendant did knowingly and willfully receive the said lottery tickets knowing that they had been unlawfully carried in interstate commerce. Count 6 charged that the defendant in or about the last two weeks of December, 1959, did knowingly and willfully cause to be carried in interstate commerce from Puerto Rico to New York City "a number of lists of the prizes drawn and awarded by means of a lottery." Count 7 charged that the defendant did knowingly and willfully receive the aforesaid lists of prizes, knowing that they had been transported unlawfully in interstate commerce. Count 8 charged that the defendant on or about January 3, 1960, knowingly and willfully did cause to be carried in interstate commerce from New York City to Puerto Rico certain lottery tickets. Count 9 charged that on or about January 7, 1960, the defendant knowingly and willfully

Exhibit A

did cause to be carried in interstate commerce certain lottery tickets.

Defendant pleaded not guilty, and the case was tried by the district court without a jury. The district court found that the defendant was guilty on each of the nine counts in the indictment. On count 1, charging a conspiracy, the court imposed a sentence of one year and one day but suspended the execution of this sentence and placed the defendant on probation for a period of five years. On the remaining eight counts, charging the various substantive offenses, the defendant was fined the sum of $250 on each count, for a total fine of $2,000.

On this appeal from the judgment of conviction, defendant urges the insufficiency of the evidence to warrant a conviction. Defendant also claims that transportation between Puerto Rico and New York is not "interstate" commerce, as defined in 18 U. S. C. §10.

The government's case against the defendant, who did not testify in his own behalf, rested on the testimony of one Rodriguez, substantiated in part by that of various government agents. Rodriguez testified that while in a bar during a visit from Puerto Rico to New York City, he overheard about selling tickets for the weekly lottery held in Puerto Rico. He asked one of the persons engaged in the conversation, Figueroa, if he purchased such tickets. Figueroa said that he did not but he gave Rodriguez the unlisted telephone number of the defendant. Rodriguez then called the given number, spoke with the defendant, and a meeting was arranged. Rodriguez and De Jesus met, and in the course of the conversation De Jesus said that he would be interested in purchasing 400 lottery tickets

for delivery in New York City. Rodriguez explained to the defendant that he would personally deliver the tickets, and the two men agreed upon a price of $16.50 per ticket. Rodriguez also stated that after the drawing he would deliver to De Jesus the lists of the winning tickets.

This transaction was accomplished as contemplated: Rodriguez went to Puerto Rico, purchased 400 tickets for the drawing to be held December 27, 1959; put them in a box, and on December 16, 1959, air-shipped them to New York City, naming himself as consignee. Rodriguez then flew to New York, where he picked up the tickets at the airport and delivered them to De Jesus at the latter's house. After inspecting the box, which still bore the shipping labels, De Jesus paid Rodriguez $6,000, and ordered 400 tickets for another drawing. This second transaction was executed in the same manner as the first, with the addition that Rodriguez also shipped to New York 35 lists of the winning lottery tickets in the first drawing. For this second delivery Rodriguez was paid by De Jesus by handing to him certain winning lottery tickets which were worth $6,145, plus $455 in cash.

Again De Jesus ordered more tickets, and Rodriguez returned to Puerto Rico, where he cashed in the winning tickets that had been given him and bought the additional 600 tickets for the third drawing, as requested. Evidently the scheme had been discovered, however, for while the two boxes containing the 600 tickets were at the airport in San Juan they were opened by government agents, all the tickets but one were withdrawn, and the boxes were resealed and sent on their way. Upon their arrival in New York another agent observed their delivery to Rod-

riguez' mother. The agent opened the boxes and found the lottery ticket; when Rodriguez arrived he was arrested. Subsequently De Jesus' apartment was searched, and various lottery tickets and lists of winning numbers were found there.

The only testimony contrary to that of Rodriguez came from Figueroa, who denied that he had given the defendant's telephone number to Rodriguez in a bar, and who related a conversation between Rodriguez and the defendant in which the latter had said he would not purchase any lottery tickets. The district court apparently disbelieved the witness Figueroa, as he was free to do, and gave credence to the testimony of Rodriguez, which was amply supported by that of the government agents and by the introduction of the bills of lading for the three shipments, as well as the various lottery tickets and lists found in the defendant's apartment.

It can hardly be denied that there was sufficient evidence to support the conviction on counts 3, 5 and 7. The testimony of Rodriguez that De Jesus had received the tickets and the lists of winning tickets was substantiated by the search of De Jesus' apartment conducted by the government agent. *United States* v. *Wade et al.*, 59 F. 2d 831 (S. D. Texas 1932), and *United States* v. *McGuire*, 64 F. 2d 485, 491 (2d Cir. 1933), much relied upon by appellant, are inapposite. In *Wade* the acquitted defendants had no connection with the tickets before their journey in interstate commerce had terminated. In *McGuire*, a count of the indictment charged that the tickets had "theretofore been transported" in interstate commerce. The count being demurred to on the ground that no federal crime had

been alleged, the demurrer was sustained, and as to that count only the defendants were discharged.

The evidence to sustain the conviction of De Jesus for conspiracy, as charged in count 1, seems no less convincing: An agreement which entailed a prohibited interstate shipment was made and the necessary overt acts were carried out.

Conviction on the remaining five counts in the indictment must rest upon the application of § 2 of Title 18, which provides that:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Under our decision in *United States* v. *Peoni*, 100 F. 2d 401, 402 (1938), it is enough that De Jesus "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." See also *Nye & Nissen* v. *United States*, 336 U. S. 613, 619-20 (1949); *Pereira* v. *United States*, 347 U. S. 1 (1954). The undertaking by De Jesus in advance of the shipments of the tickets to purchase the tickets once they had arrived is sufficient to support his conviction as an aider and abetter of all the criminal conduct that Rodriguez did.

So far as the substantive offense in count 8 is concerned, which charged the defendant with having caused

to be carried in interstate commerce from New York City to Puerto Rico certain winning lottery tickets, it was obviously essential to the plan that these tickets should be returned to Puerto Rico for collection.

18 U. S. C. §10 defines the term "interstate commerce," as used in this title, as including "commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia." Defendant here relies upon the oft-repeated shibboleth that criminal statutes "must be strictly construed," and he asks us therefore to hold that Puerto Rico, which became a commonwealth in 1952, has ceased to be a "territory" or a "possession" and hence is not within the statutory definition. This argument must be rejected, upon the authority of *Moreno Rios* v. *United States*, 256 F. 2d 68, 71 (1st Cir. 1958). See also *Detres* v. *Lions Bldg. Corp.*, 234 F. 2d 596 (7th Cir. 1956).

We do not doubt that, at the time of its original enactment on March 4, 1909, 35 Stat. 1136, and in 1948, when the Criminal Code was enacted into law, Congress intended the act to apply to Puerto Rico, which had not at that time received commonwealth status. In view of the important provision of the so-called "compact" to the effect that "[t]he statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Puerto Rico as in the United States," 48 U. S. C. §734, it was not necessary for the Congress to alter specifically all outstanding statutes theretofore previously applicable in order to continue their effectiveness in Puerto Rico after it became a commonwealth in 1952. See *Moreno Rios* v. *United States*, *supra*, 256 F. 2d 68, 72.

The judgment of the District Court is affirmed.

Judgment of the United States Court of Appeals

UNITED STATES COURT APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of April, one thousand nine hundred and sixty-one.

Present:

HON. CALVERT MAGRUDER,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MELQUIADES DE JESUS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk